

IN THE UNITED STATES DISTRICT COURT  
OR THE EASTERN DISTRICT OF CALIFORNIA

Plaintiff moves to amend the Scheduling Order and moves to amend its complaint to add the following additional Defendants: New Verde Mines LLC, Newmont North America LLC,<sup>1</sup> Newmont International Services Limited, Newmont Realty Company, and Newmont Capital Limited

<sup>1</sup> The parties agreed at the hearing that New Verde Mines LLC and Newmont North America LLC are the same entity. New Verde Mines LLC changed its name to Newmont North America LLC.

1 (collectively "Related Newmont Entities"). Defendants oppose  
2 Plaintiff's motions.

3 BACKGROUND

4 A Scheduling Order issued on May 12, 2006, which contains a  
5 provision prohibiting further joinder of parties or amendment of  
6 pleadings "except with leave of Court, good cause having been shown."  
7 (Order, May 12, 2006, at 1.) Plaintiff argues it has demonstrated  
8 "good cause" justifying the amendments it seeks. (Pl.'s Mot. to Amend  
9 at 6:16-17.) Defendants disclosed in July 2004, as part of their  
10 initial discovery, a chain of title guarantee listing New Verde Mines  
11 LLC as the holder of mineral rights under Plaintiff's Wastewater  
12 Treatment Plant. (Aff. of Thayer, Ex. 3 at 3.) The parties  
13 subsequently conducted settlement negotiations and agreed to stay the  
14 action for the purpose of trying to reach a settlement from February  
15 1, 2005 through August 1, 2005 and again from December 5, 2005 through  
16 April 5, 2006. (Order, Dec. 6, 2005, at 1-2.)

17 Beginning in August 2006, Plaintiff asked several deponents  
18 about New Verde Mines LLC and its relationship to Defendant Newmont  
19 Mining Company's involvement in Grass Valley, but the deponents were  
20 unable to explain the relationship. (Bardwick Decl., Ex. G at 2, Ex.  
21 I at 2.) In December 2006, Plaintiff notified the current Defendants  
22 of its intention to move to amend its complaint to add New Verde Mines  
23 LLC and Newmont North America LLC as Defendants. (Id., Ex. J at 1.)  
24 Plaintiff then deposed Defendants' "person most knowledgeable"  
25 regarding corporate structure in January 2007. (Id., Ex. O.) In  
26 addition, in February 2007, Defendants admitted through a Request for  
27 Admissions that New Verde Mines LLC and Newmont Realty Company were  
28 wholly owned subsidiaries of Defendant Newmont USA Limited and that

1 Newmont Mining Corporation owns shares in Newmont Capital Limited.  
2 (*Id.*, Ex. S at 3, 11.) Plaintiff then filed this motion on March 23,  
3 2007 to amend the scheduling order and to amend its complaint. (Pl.'s  
4 Mot. to Amend at 1.) The motion was argued on April 30, 2007.

5 DISCUSSION

6 I. Amending the Scheduling Order

7 Plaintiff asserts it has good cause to amend the portions of  
8 the Scheduling Order establishing the deadline for amendment of  
9 pleadings. (Pl.'s Mot. to Amend at 6:16-17.) Defendants rejoin good  
10 cause does not exist to justify allowing Plaintiff to make further  
11 amendments. (Defs.' Opp'n at 2:21.)

12 Federal Rule of Civil Procedure 16<sup>2</sup> provides that a pretrial  
13 Scheduling Order "shall not be modified except upon a showing of good  
14 cause and by leave of the district judge." "Rule 16(b)'s good cause  
15 standard primarily considers the diligence of the party seeking the  
16 amendment." Johnson v. Mammoth Recreations, 975 F.2d 604, 609 (9th  
17 Cir. 1992) (internal quotation marks omitted).

18 [T]o demonstrate diligence under Rule 16's good  
19 cause standard, the movant may be required to show  
20 the following: (1) that [it] was diligent in  
21 assisting the Court in creating a workable Rule 16  
22 order, (2) that [its] noncompliance with a Rule 16  
23 deadline occurred or will occur, notwithstanding  
24 [its] diligent efforts to comply, because of the  
development of matters which could not have been  
reasonably foreseen or anticipated at the time of  
the Rule 16 scheduling conference, and (3) that  
[it] was diligent in seeking amendment of the Rule  
16 order, once it became apparent that [it] could  
not comply with the order.

25 Jackson v. Laureate, Inc., 186 F.R.D. 605, 607 (E.D. Cal. 1999)  
26 (internal quotation marks omitted).

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28 <sup>2</sup> All further Rule references are to the Federal Rules of Civil  
Procedure.

1        A. Creating a Workable Order

2            Defendants argue Plaintiff was not diligent in creating a  
3 workable Rule 16 order because Plaintiff filed three status reports in  
4 which Plaintiff said it had no intention of adding Defendants and then  
5 subsequently moved to amend its Complaint to add Defendants. (Defs.'  
6 Opp'n at 4:13-14.) Plaintiff rejoins that when those status reports  
7 were filed Plaintiff "simply did not yet know the identity and  
8 relationships among the Related Newmont Entities" and therefore,  
9 Plaintiff did not know it would move at a later date to add  
10 Defendants. (Pl.'s Mot. to Amend at 5:1-3.) In addition, Plaintiff  
11 responds that it participated in all scheduling discussions and agreed  
12 to a "Joint Stipulation and Order for Extension of Time" with  
13 Defendants to modify the law and motion deadlines. (Pl.'s Mot. to  
14 Amend at 7:10-19.)

15           Nothing in the record indicates Plaintiff knew it would seek  
16 to amend its complaint at the time the status reports were filed.  
17 Since Plaintiff participated in creating a workable Rule 16 order,  
18 Plaintiff has shown diligence.

19        B. Development of Unforeseen Matters

20           Plaintiff asserts that although it was aware of the  
21 existence of New Verde Mines LLC and Newmont North America LLC in  
22 2004, it was not aware of the relationship between these entities and  
23 Newmont; nor was it aware of the role these entities played in  
24 Newmont's Grass Valley operations until the close of discovery.  
25 (Pl.'s Reply at 3:5-9.) Therefore, Plaintiff asserts it has good  
26 cause to amend its complaint. (*Id.*) Defendants countered at the  
27 hearing that Plaintiff received documents listing New Verde Mines LLC  
28 as the mineral rights holder underneath Plaintiff's property as early

1 as 2004. Defendants further asserted that since Newmont is a publicly  
2 traded company, Plaintiff could have ascertained the relationship  
3 between the other Related Newmont Entities through public records  
4 searches before the close of discovery. Defendants argued that  
5 therefore, Plaintiff was not diligent conducting discovery and has not  
6 shown good cause to amend its complaint.

7 i. New Verde Mines LLC & Newmont North America LLC

8 Plaintiff admitted at the hearing that it received the chain  
9 of title guarantee in 2004 listing New Verde Mines LLC as the holder  
10 of mineral rights in Grass Valley. Plaintiff asserts, however, that  
11 the chain of title guarantee was part of a 30,000 document production  
12 from Defendants, that Newmont has hundreds of related entities, and  
13 therefore, it was difficult and time consuming for Plaintiff to  
14 accurately determine which of Newmont's related entities should be  
15 joined in this litigation.

16 The diligence issue concerns whether Plaintiff's counsel  
17 acted as a reasonable attorney would have acted in pursuing  
18 information in a similar situation. White v. Sabatino, 2007 U.S.  
19 Dist. LEXIS 18760, \*12 (D. Haw. Mar. 16, 2007) (holding plaintiff was  
20 diligent despite not uncovering relevant information during discovery  
21 because it would not be readily ascertainable by reasonable counsel).  
22 This is a difficult question to decide.

23 Plaintiff did not uncover the relevant information regarding  
24 the relationship between New Verde Mines LLC and Newmont Mining  
25 Corporation until the close of discovery. Plaintiff did take steps to  
26 attempt to acquire this information, but whether additional steps  
27 should have been taken in 2004 is not patently clear. Plaintiff had  
28 to wade through thousands of documents about hundreds of related

1 entities, and therefore, Plaintiff appears to have been diligent in  
2 its search for the relevant information. In addition, Plaintiff was  
3 aided in its endeavor to investigate the public records when it hired  
4 a public record search firm where at least two specialists conducted  
5 public records searches. However, Plaintiff stated at the hearing  
6 that these experts were unable to determine the relationship between  
7 the Related Newmont Entities because of missing documents in the  
8 record. The record presents a difficult question on the issue of  
9 whether Plaintiff was diligent in pursuing discovery regarding New  
10 Verde Mines LLC and Newmont North America LLC. But Plaintiff's  
11 showing meets the bare minimum required to have the Scheduling Order  
12 amended.

13 ii. Remaining Related Newmont Entities

14 Plaintiff further contends it was diligent in pursuing  
15 information regarding the remaining Related Newmont Entities.  
16 Defendants do not point to any documents disclosed during discovery  
17 that should have reasonably alerted Plaintiff to the remaining Related  
18 Newmont Entities' relationship to Newmont Mining or their involvement  
19 in Newmont's Grass Valley operations. Instead, Defendants argued at  
20 the hearing that Plaintiff was not diligent because Plaintiff should  
21 have discovered this information through public records. Plaintiff  
22 rejoined that despite conducting public records searches, it was  
23 unable to ascertain the necessary information regarding which Newmont  
24 entities were proper Defendants.

25 Although Plaintiff was unable to uncover the relevant  
26 information before the close of discovery, Plaintiff has shown it took  
27 reasonable steps to ascertain the relationship of the Related Newmont  
28 Entities through public record searches. Therefore, Plaintiff was

1 diligent and its inability to comply with the Scheduling Order is  
2 based on reasonably unforeseen events.

3 C. Diligence in Seeking Amendment

4 Plaintiff asserts it sought to amend as soon as it  
5 reasonably could. (Pl.'s Mot. at 7:26-27.) Defendants rejoin  
6 Plaintiff's delay is inexcusable. (Defs.' Opp'n at 4.)

7 Plaintiff sent Defendants a letter on December 5, 2006  
8 informing Defendants of its intention to move to add New Verde Mines  
9 LLC and Newmont North America LLC as Defendants and also specified  
10 that Plaintiff "anticipate[d] that additional Newmont entities may  
11 become known during the remaining months of discovery." (Bardwick  
12 Decl., Ex. J at 1.) Plaintiff then conducted its deposition of  
13 Defendants' "person most knowledgeable" on corporate structure in  
14 January 2007 and received Defendants' responses to its Request for  
15 Admissions in February 2007. (Id., Ex. O, Ex. S.) Plaintiff filed  
16 this motion on March 23, 2007. (Pl.'s Mot. to Amend at 1.)

17 Plaintiff did not have sufficient evidence to move to amend  
18 its complaint to add the Related Newmont Entities prior to Plaintiff's  
19 deposition of Defendants' person most knowledgeable in January 2007  
20 and Defendants' answers to Plaintiff's Request for Admissions in  
21 February 2007. It is understood that it takes time to prepare a  
22 motion before it can be filed and therefore, it was not unreasonable  
23 for Plaintiff to wait until March 2007 to file its motion.

24 D. Prejudice

25 Defendants assert they will suffer prejudice if Plaintiff's  
26 motion is granted because "[d]iscovery has closed, dispositive motions  
27 have been filed, and the parties are preparing for trial in five  
28 months." (Defs.' Opp'n at 5:9-10.) Plaintiff rejoins that it does

1 not seek any additional discovery and does not seek to change any of  
2 the other dates set by the Scheduling Order. (Pl.'s Reply at 6:25-  
3 27.) In addition, Plaintiff asserts it "provided Newmont more than  
4 adequate notice of its intent to move for this amendment, precisely to  
5 avoid any possibility of prejudice." (Pl.'s Reply at 25-26.)

6 Although the focus of analysis under Rule 16 is on the  
7 diligence of the moving party, "the existence or degree of prejudice  
8 to the party opposing the modification might supply additional reasons  
9 to deny a motion." Jackson, 186 F.R.D. at 607. However, a delay in  
10 the litigation proceedings is insufficient to deny a request to amend.  
11 See DCD Programs, Ltd v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987).  
12 Likewise, extending deadlines for discovery, in light of information  
13 Plaintiff learns through discovery, is not the type of prejudice that  
14 precludes amendment under Rule 16. Fru-Com Constr. Corp. v.  
15 Sacramento Mun. Util. Dist., 2006 U.S. Dist. LEXIS 94421, \*16-17 (E.D.  
16 Cal. Dec. 15, 2006). In addition, allowing an amendment to add  
17 Defendants which makes a case more complicated is not prejudice  
18 sufficient to preclude amendment under Rule 16. Id.

19 Defendants will not suffer the type of prejudice which  
20 justifies precluding amendment under Rule 16. Therefore, Plaintiff  
21 has shown good cause to amend the Scheduling Order.

22 II. Amending the Complaint

23 Plaintiff asserts the Related Newmont Entities meet the  
24 requirements for joinder under Rule 20 because Plaintiff alleges they  
25 are jointly and severally liable for Newmont's actions in Grass  
26 Valley. (Pl.'s Mot. at 8:24-25.) Defendants do not respond to this  
27 argument.

1 Rule 20 provides that joinder is proper when the right to  
2 relief against the party to be joined is asserted jointly or  
3 severally. Since Plaintiff asserts joint and several liability  
4 against the Related Newmont Entities, Plaintiff's motion to amend its  
5 complaint is granted.

6 III. Pending Summary Judgment Motion

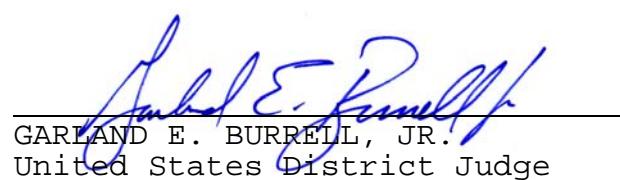
7 Currently cross motions for summary judgment are pending and  
8 are set for hearing on May 14, 2007. Defendants stated at the hearing  
9 that if Plaintiff's motion to amend were granted, the pending summary  
10 judgment motion would need to be "restyled" to include the additional  
11 Defendants. Therefore, the May 14, 2007 hearing on the motions for  
12 summary judgment is vacated and rescheduled to commence at 10:00 a.m.  
13 on June 11, 2007. If either party's pending motion requires changes  
14 to incorporate the additional Defendants, the revised motions shall be  
15 filed by May 17, 2007. Any opposition shall be filed by May 25, 2007  
16 and any reply shall be filed by June 4, 2007.

17 CONCLUSION

18 Plaintiff has five days from the date on which this Order is  
19 filed to file and serve its Third Amended Complaint.

20 IT IS SO ORDERED.

21 Dated: May 9, 2007

22   
23 GARLAND E. BURRELL, JR.  
24 United States District Judge